SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1950

No. [redacted] 30

THE UNITED STATES OF AMERICA,
Appellant,

vs.

UNITED STATES GYPSUM COMPANY, SEWELL L. AVERY, OLIVER M. KNODE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

STATEMENT OF UNITED STATES GYPSUM COMPANY, SEWELL L. AVERY AND OLIVER M. KNODE OPPOSING JURISDICTION.

ALBERT R. CONNELLY,
CRANSTON SPRAY,
HUGH LYNCH, JR.,
Counsel for Appellees.

INDEX

Subject Index

Table of Cases Cited

Statutes Cited

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

vs.

UNITED STATES GYPSUM COMPANY, ET AL.,

Defendants.

STATEMENT BY DEFENDANTS UNITED STATES GYPSUM COMPANY, SEWELL L. AVERY AND OLIVER M. KNODE OF GROUNDS MAKING AGAINST THE JURISDICTION OF THE SUPREME COURT ASSERTED BY PLAINTIFF.

There is no question but that the Supreme Court has jurisdiction to review, by direct appeal, a final judgment of the District Court under Section 2 of the Expediting Act of February 11, 1903, as amended. The question here is whether there is any substantial question presented by the appeal.

The Issues and the Ruling Below

It is stated that the District Court was held to have erred in its interpretation of *United States* v. *General Electric Co.*, 272 U.S. 476, in concluding that the Govern-

ment's evidence failed to show violation of the Sherman Act and in certain of its findings (p. 3). The Supreme Court held that the evidence at the close of the Government's case established that the industry-wide license agreements entered into with knowledge on the part of licensor and licensees of the adherence of others, with the control over prices and methods of distribution through the agreements and the bulletins were sufficient to establish a *prima facie* case of conspiracy and that at this point in the case, the declarations and acts of the various members were admissible against all, as declarations or acts of co-conspirators. The holding, as we view it, was not intended as a conclusive determination of any issue in the case.

At a hearing before the trial court on June 8, 1948, it appeared that, in view of the Supreme Court's opinion, the Government was considering the question of filing a motion for summary judgment (Tr. 7765, 7773) on the ground, as then stated by plaintiff, that the Supreme Court had held that the license agreements with price limitation and adherence thereto by defendants without more constituted a violation of the Sherman Act. In this connection the trial court indicated that about the only way to arrive at a determination of the meaning of the Supreme Court's opinion was to get something before it upon which to rule and that for this purpose it would entertain a motion for summary judgment (Tr. 7788-9), in which connection it was suggested that plaintiff file its motion. Plaintiff was then granted time within which to file the motion (Tr. 7796-7), and it did file it.

Plaintiff rested its motion for summary judgment on the ground, as stated by it, that there was no genuine issue of fact in the case with respect to any material fact essential to make out a combination or conspiracy in restraint of trade or monopoly of trade or commerce under the

Sherman Act. It was argued by counsel for plaintiff that the Supreme Court had held that the license agreements with price limitation and adherence thereto by defendants constituted a violation of the Sherman Act, notwithstanding the good faith of the defendants or the assumed legality of each separate license contract; that the defendants admittedly executed the license agreements and adhered to the price provisions thereof with knowledge of the adherence of the others; and that it being sufficient to show price control under the licenses, their purpose was to clear this to the essential point in issue—which they thought was not in issue—and ask for summary judgment on that basis. Plaintiff's motion was filed under Rule 56 of the Federal Rules of Civil Procedure which specifically provides that the judgment sought shall be rendered forthwith if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Upon that basis it was only necessary for the Government to point to the admissions of the defendants to show that there was no controversy as to any material fact. Defendants never denied the existence of the license agreements with price limitation adhered to by them, but rested their defense upon the firm belief that they had a right to do so under the doctrine of the *General Electric* case.

When the District Court (Judge Stephens dissenting) granted the motion for summary judgment on June 29, 1948, although there was no written opinion, it is clear upon the record that the motion was granted upon the theory that the Supreme Court had held that the plurality of patent licenses industry-wide with price-fixing provisions adhered to by the defendants with knowledge of the adherence of the others was *ipso facto* illegal as in violation of the Sherman Act, notwithstanding the assumed

legality of each separate patent license. Judge Garrett said that it was his opinion that if everything could be testified to which is in the proffer of proof it would bring no change in the decision of the Supreme Court on the *fundamental question involved;* that he was unable to see any loophole through which there could be a conclusion different from that reached by the Supreme Court *upon the fundamental question.* Judge Jackson said that Judge Garrett's reasoning paralleled his. (Tr. 7935-6).

Upon that theory, notwithstanding the good faith of the defendants in entering into the license agreements or adhering to the price provisions thereof or the assumed legality of each separate patent license, the District Court, in determining the fundamental question in the case, held that concert of action as aforesaid under the patent license agreements constituted a violation of the Sherman Act; that there was no controversy as to any material fact with respect thereto, since the defendants admitted the facts necessary to the determination. That was the full scope of the determination upon the motion for summary judgment.

The District Court, having determined that plaintiff was entitled to summary judgment, entered a final decree of its own making within the scope of the determination. The decree afforded full and adequate relief and gave to plaintiff the very judgment which it sought. If plaintiff's theory is correct, a thing it can not now deny on this record, there is no basis for any complaint with respect to the provisions of the decree entered by the court. Plaintiff certainly is not entitled to a decree based upon the conclusive determination of all the controversial issues of fact in favor of plaintiff's contention, the same as if the District Court had heard the defendants' evidence and ruled against them on all such issues at the close of the trial.

It was stated in plaintiff's jurisdictional statement that the Government's motion prayed for summary judgment in its favor or, in the alternative, if judgment should not be rendered on the whole case and a further trial should be necessary, that the court ascertain what material facts were without substantial controversy and those in good faith controverted, and make an order specifying such facts (p. 4). Plaintiff, although filing its motion in the alternative, as above stated, took the unalterable position that because of the admissions of the defendants with respect to the license agreements, no genuine issue of any material fact remained in the case, and that plaintiff's motion for summary judgment should accordingly be granted. Summary judgment was sought by it and granted upon that theory alone and plaintiff cannot now, before this court, say that the District Court should have proceeded to trial upon facts specified by it to be in controversy between the parties.

The Questions Are Not Substantial

Plaintiff complains that the decree of November 7, 1949, is insufficient in that it fails to provide adequate relief. Plaintiff, as shown, rested its motion for summary judgment upon the ground that there was no issue of any material fact in the case essential to make out a conspiracy in violation of the Sherman Act, based upon the admissions of defendants in the record. It may not now here assert anything to the contrary, for not only was its motion based upon the premise that there was no genuine issue of any material fact with respect to the fundamental issue in the case, but it sought and obtained final judgment on that theory. The final decree embodied everything which possibly could be granted within the determination made by the District Court upon the motion for summary judg-

ment. It requires no citation of authority to support the legal principle that an appeal by plaintiff from a judgment which it sought and obtained on its own motion, raises no substantial question.

The decree as entered declared that the defendant companies had acted in concert in restraint of trade and commerce among the several states in the eastern territory of the United States to fix, maintain and control the prices of gypsum board and had monopolized trade and commerce in the gypsum board industry, in violation of Sections 1 and 2 of the Sherman Antitrust Act. The license agreements were adjudged unlawful and declared to be illegal, null and void. The defendant companies, their respective officers, directors, agents, employees, representatives, subsidiaries and any person acting under or through them were enjoined and restrained from further performance or enforcement of any of the provisions of the patent licenses or the price bulletins issued thereunder, from entering into or performing any agreement or understanding for the purpose or with the effect of continuing, reviving or reinstating any monopolistic practice, and from entering into or performing any agreement or understanding in restraint of commerce in the gypsum board industry among the several states in the eastern territory thereof by license agreements to fix, maintain or stabilize prices of gypsum board or the terms and conditions of sale thereof. The defendant United States Gypsum Company was required to grant to any applicant non-exclusive licenses under the board patents upon royalties not to exceed those charged in the cancelled license agreements and containing the ordinary provisions found in non-exclusive license contracts.

Plaintiff makes no attempt to set aside the judgment as it could not for the reasons above stated, but in objecting

to the provisions of the decree merely presents a series of negative statements criticizing the decree without any showing that the trial court abused its discretion in determining the relief to be granted. When a violation of the Act has been found it is for the trial court to determine, in the exercise of its sound discretion, the relief to be afforded, and the trial court's exercise of its discretion will not be lightly disturbed. *Associated Press* v. *United States*, 326 U. S. 1; *United States* v. *National Lead Co.*, 332 U. S. 319.

Plaintiff said in its jurisdictional statement that the decree failed to provide effective safeguards against continuation or renewal of defendants' pricing practices; that the decree only terminated the existing license agreements; and that the decree tends to enhance U. S. Gypsum's position in the industry (p. 6, 7). The decree not only terminated the existing license agreements but effectively prevented any such price-fixing in the gypsum board industry. None of defendants' actions extended beyond the operation of the license agreements and although plaintiff made charges with respect to other methods of pricing and the suppression of production and stabilization of prices of other gypsum products, no determination was made with respect to these controversial issues, nor could it without the defendants having their day in court. The defendants, in operating under the patent license agreements, acted in good faith, relying upon the advice of their attorneys with respect to the holding of the Court in *United States* v. *General Electric Co.*, 272 U. S. 476. They did no more, as they viewed it, than was approved by the Supreme Court in the *General Electric* case, and which this Court, referring to the opinion of the District Court in sustaining the original motion of defendants to dismiss, said "stemmed logically from its understanding" of that case (333 U. S.

389). The defendants never at any time denied that they entered into the license agreements or that prices were fixed upon the patented products manufactured by them. The decree in no uncertain terms destroyed the monopoly which plaintiff charged existed by virtue of the plurality of industry-wide licenses and defendants were enjoined from entering into or performing any agreement for the purpose or with the effect of continuing, reviving or reinstating any such monopolistic practice. There could be no difficult question of proof in case of a violation of the decree, as suggested by plaintiff.

There is nothing in the record to support plaintiff's assertion that the licensees are at a disadvantage in bargaining with licensor as to the terms of new license agreements (p. 7). Not a single licensee has appealed from the decree or complained about the approved forms of license agreements, nor could they possibly have any objection to a license which gives them every right and privilege to use the patents without incurring any obligation at all unless they make patented board, at royalties not in excess of those formerly paid. The royalty provisions which were adopted by the court after a full consideration of all the facts in the case are satisfactory to the licenseees and apply only to the extent that the patents are used in the manufacture of patented board.

Equally without merit is plaintiff's objection to the provisions of the licenses requiring reports of patented board sold and inspection of licensees' records to verify the correctness of royalties paid (p. 7). The license provision in this respect requires a report only of past sales and prices and the inspection of books is limited to those records showing the quantity manufactured together with the price at which sold. The licensee may require any such examination to be made by a certified public accountant of his own

choosing rather than by licensor for the sole purpose of reporting the accuracy of the royalty payments.

It is contended by plaintiff that a patentee should be required to make his patents available on reasonable terms to any one wishing to use them (p. 7), citing *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, and *United States* v. *National Lead Co.*, 332 U. S. 319. The court has sustained such a decree only in those rare cases where in aid of the injunction it was required to preclude the resumption of deliberate unlawful practices because of a persistent manifestation by the defendants of a purpose to violate the Antitrust Act. In the instant case, as distinguished from the facts in the *Hartford-Empire* and *National Lead* cases, the trial court recognized that the defendants entered into the license agreements in the utmost good faith relying upon the doctrine of *United States* v. *General Electric Co.*, 272 U. S. 476, as it was then generally construed. There was no manifestation by the defendants in this case of a deliberate purpose to violate the Antitrust Act. Furthermore, at the date of the decree it appeared in the record that all patents in the main license agreements had expired except the three Roos bubble patents which expire in 1952 and 1954; that price control under the licenses had ceased voluntarily upon the expiration of the Haggerty starch patent in July 1941; and that there was no evidence that any board manufacturer had ever been refused a license upon request.

Complaint is made that while the present decree provides for licensing any applicant, the ninety-day limitation of this requirement makes it a practical nullity so far as any newcomer to the business is concerned (p. 7). The court's purpose in granting the right to take licenses was to protect the present licensees, all the board manufacturers in the industry, since the prior license agreements had been cancelled out in their entirety. The ninety-day provision is

ample for that purpose, as it is also with respect to any person presently contemplating the manufacture of board. Furthermore, as shown above, no application for a license by a board manufacturer has ever been denied by licensor, practically all of the patents have expired, and there is nothing in the case which would suggest even that a newcomer would have any difficulty in obtaining a license if he desired one.

It is complained that the decree failed to enjoin the individual defendants and to impose upon the defendants the full taxable costs (p. 8). Upon the motion for summary judgment, on the Government's theory, only the defendant companies were involved in adhering to the price provisions of the licenses. The decree enjoins the defendant companies and each of their respective officers, directors, agents, employees and representatives from performance of the patent licenses, including the price bulletins, and from entering into any agreement among the defendants to monopolize or restrain trade as set forth therein. The individuals were not parties to the license agreements but, acted only as officers or agents of their respective companies and to treat them as such in the decree is sufficient, as was stated in the *Hartford-Empire* case, 323 U. S. 386, 428, 433. It is well established that the matter of taxing costs is one within the discretion of the trial court, and it is a matter of no substantiality in support of plaintiff's appeal. *Kansas City Southern Ry. Co.* v. *Guardian Trust Company*, 281 U. S. 1, 9. There is nothing in *Chicago Sugar Co.* v. *American Sugar Refining Co.*, 176 F. 2d 1, 11, cited by plaintiff, which conflicts with the general rule as stated.

Plaintiff refers to the alleged "novel theory" of the trial court in being influenced in the exercise of its discretion in framing a decree by the belief that the defendants acted in good faith (p. 8). The point is neither novel nor of substance. While good faith will not relieve a defendant

from the charge of violating the Sherman Act, the conduct of the defendants, their intent, and the good faith in which they acted, are always matters properly to be considered by the court in exercising its discretion in determining what must necessarily be included in a decree to effectively prevent the continuance or recurrence of the violation being enjoined. They are inherent in the oft repeated principle that the decree should be drawn to meet the exigencies of the particular case.

Plaintiff in support of its appeal further states that when summary judgment is entered against defendants in a Sherman Act proceeding the usual rule prevails that the judgment should be so framed that it will bar further violation of the statute (p. 8). The "usual rule" is that the decree in each instance must be framed in the light of the particular case before the court and should be sufficient to meet the exigencies of the case established by the record. In approving the trial court's action in *International Salt Co.* v. *United States*, 332 U. S. 392, this Court took pains to say that "the framing of decrees should take place in the District rather than in Appellate courts" and expressly pointed out that district courts "are invested with large discretion to model their judgments to fit the exigencies of the particular case" (332 U. S. at pages 400-1).

In an effort to support its contention of substantiality of its appeal, plaintiff contends (p. 9) that in numerous appeals in antitrust cases the adequacy or appropriateness of the relief granted by the trial court has presented an issue of more general importance than the question of substantive violation of the statute. (Citing *Crescent Amusement Co.* v. *United States*, 323 U. S. 173; *United States* v. *National Lead Company*, 332 U. S. 319, and *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131).

The only change which the Government obtained in the *Crescent Amusement* decree was a provision that the defend-

ants could not acquire additional theatres "except after an affirmative showing that such acquisition will not unreasonably restrain competition" in lieu of a prohibition against such acquisition unless the sale was "voluntarily" made and when none of the defendants, their officers, agents or servants were guilty of "coercing or attempting to coerce independent operators into selling out to it, or to abandon plans to compete with by it predatory practices" (323 U. S. at pp. 185-7). In *National Lead*, the Supreme Court rejected all efforts, including the Government's, to modify the decree as entered below. And in *Paramount Pictures*, although the trial court's findings on the monopoly charges were reversed and the case remanded, the principal provision of the decree rejected appeared to be the requirement that films be licensed on a competitive basis, a provision initially proposed by the Government but resisted by it in the Supreme Court (334 U. S. at pp. 161-2).

The plaintiff states that the basic issue which the appeal presents is whether the Government has won a lawsuit and lost a cause (p. 9). Certainly no one would seriously contend that in *United States* v. *Masonite Corporation*, 316 U. S. 265, the Government "won a lawsuit and lost a cause," and yet the terms and scope of the decree entered in the *Masonite* case are substantially the same as the decree entered herein.

It does not appear from anything stated by plaintiff that the District Court abused its discretion in entering its decree. The decree adequately covers everything which the Government sought and obtained upon its motion for summary judgment. Having thus pitched its case, plaintiff must accept the legal consequences as to the form of decree which could be properly entered upon such a determination. It may not now contend that it is entitled to a judgment founded on the theory that all of the controversial issues

have been conclusively determined against the defendants without the defendants having their day in court.

We submit there is no substantial question presented by the Government's appeal.

Respectfully submitted,

ALBERT R. CONNELLY,
CRANSTON SPRAY,
HUGH LYNCH, JR.,
Attorneys for Defendants,
United States Gypsum Company,
Sewell L. Avery and Oliver M. Knode.